

United States District Court
Northern District of California

GILLIAN K. O.,¹
Plaintiff,
v.
KILOLO KIJAKAZI,
Defendant.

Case No. 22-cv-07019-RMI

ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 15, 17

Plaintiff seeks judicial review of an administrative law judge (“ALJ”) decision denying her application for disability insurance benefits under Title II of the Social Security Act. *See Admin. Rec.* at 28-36.² Plaintiff’s request for review of the ALJ’s unfavorable decision was denied by the Appeals Council (*see id.* at 1-6), thus, the ALJ’s decision is the “final decision” of the Commissioner of Social Security which this court may review. *See 42 U.S.C. §§ 405(g), 1383(c)(3).* Both Parties have consented to the jurisdiction of a magistrate judge (dkts. 7 & 8), and both parties have moved for summary judgment (dkts. 15 & 17). For the reasons stated below, Plaintiff’s motion for summary judgment is granted, and Defendant’s motion is denied.

LEGAL STANDARDS

The Commissioner's findings "as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). A district court has a limited scope of review and can only set

¹ Pursuant to the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States, Plaintiff's name is partially redacted.

² The Administrative Record (“AR”), which is independently paginated, has been filed in eight attachments to Docket Entry #13. See (dkts. 13-1 through 13-8).

aside a denial of benefits if it is not supported by substantial evidence or if it is based on legal error. *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1457 (9th Cir. 1995). The phrase “substantial evidence” appears throughout administrative law and directs courts in their review of factual findings at the agency level. *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1154 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Sandgathe v. Chater*, 108 F.3d 978, 979 (9th Cir. 1997). “In determining whether the Commissioner’s findings are supported by substantial evidence,” a district court must review the administrative record as a whole, considering “both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). The Commissioner’s conclusion is upheld where evidence is susceptible to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

SUMMARY OF THE RELEVANT EVIDENCE

Proceeding *pro se*, Plaintiff submits that she has suffered from a number of well documented chronic health issues since the age of 19, and that it was error for the Commissioner to deny her application for disability benefits. *See* Pl.’s Mot. (dkt. 15) at 1. Plaintiff’s summary judgment motion is limited to three sentences, however, the court’s independent review of the administrative record reveals that, among other impairments, Plaintiff has been afflicted with chronic migraines, fibromyalgia, memory deficits and other cognitive manifestations of her dyscognitive seizure disorder.³

³ The failure by a *pro se* Plaintiff, or even by an attorney, to articulate a particular error is not an acceptable reason for a reviewing court to actively ignore it in this context. *See Ariz. State Dep’t of Pub. Welfare v. Dep’t of Health, Educ. & Welfare*, 449 F.2d 456, 472 (9th Cir. 1971); *see also Moran v. Astrue*, 569 F.3d 108, 112 (2nd Cir. 2009); *Farley v. Colvin*, 231 F. Supp. 3d 335, 339-41 (N.D. Cal. 2017) (collecting cases standing for the proposition that while a remand request is normally made by a party, there is no reason why a district court may not remand, *sua sponte*, for an error that was not fully articulated); *see also Cortes v. Berryhill*, No. 3:16-cv-01910 (JCH), 2018 U.S. Dist. LEXIS 45256, 2018 WL 1392903, at *2-6 (D. Conn. March 19, 2018) (court *sua sponte* raised issue of ALJ’s failure to develop the record and reversed and remanded because it “could not ignore” a gap in record of mental health treatment); *Taylor-Tillotson v. Colvin*, No. 13-80907-CIV-WM, 2014 U.S. Dist. LEXIS 177510, 2014 WL 7211888, at *13 (S.D. Fl. Dec. 18, 2014) (“A reviewing court may *sua sponte* address issues in social security cases”).

1 As early as November of 2017, Plaintiff's neurologist diagnosed her with migraines and
2 noted that "she is currently having very frequent headaches." AR at 525, 636. A few months later,
3 in early January of 2018, Plaintiff's migraines continued to bother her. AR at 523-24, 591-92. Her
4 treating neurologist then observed, in July of 2018, that the condition still persisted and that
5 Plaintiff reported suffering from four to five true migraines per month. *See id.* at 587-90. A few
6 months later, in January of 2019, she was treated again for the continuing migraines, dyscognitive
7 spells, and memory loss. *Id.* at 519-22, 582-85. Specifically, it was noted that her focal seizures
8 with dyscognitive features may have been related to her migraines. *Id.* at 519. Her physicians also
9 noted that her migraines were attended with nausea and photophobia. *Id.* at 520. On this occasion,
10 Plaintiff also reported that her memory loss rendered it difficult for her to remember daily tasks as
11 well as remote events. *Id.* at 521. The migraine diagnosis was noted again in September of 2019,
12 as Plaintiff continued to suffer from migraine attacks. *Id.* at 672, 741.

13 In January of 2020, her neurologist noted that Plaintiff had been getting headaches more
14 often and that they were sometimes attended with a partial blurry spot in her vision. *Id.* at 730-31.
15 In April of 2020, she reported still suffering from daily migraines, at which point her doctors
16 characterized her migraines as chronic. *See id.* at 724-25. In July of 2020, the attacks became still
17 more frequent. *See id.* at 696, 706. In August of 2020, her doctors noted Plaintiff's "worsening"
18 migraines (and attendant nausea). *See id.* at 680, 683. In December of 2020, records reflect that
19 Plaintiff still suffered from migraines that caused painful head pressure, photosensitivity, and
20 posterior neck stiffness. *Id.* at 651, 656. Additionally, Plaintiff had noted on her disability report
21 that her migraine medications (Imitrex and Nortriptyline) "won't get rid of a full-blown migraine,"
22 and that notwithstanding these medications, her migraines were "still happening more frequently
23 and worsening." *Id.* at 397.

24 At the hearing on September 10, 2021, the ALJ heard testimony from a non-examining
25 medical expert (Kweli Amusa, M.D.). *See id.* at 111-14. In pertinent part, the ALJ specifically
26 asked Dr. Amusa whether or not the medical records substantiated the fact that Plaintiff "also had
27 the headaches," to which Dr. Amusa responded in the affirmative. *Id.* at 113-14. At a previous
28 hearing, on June 1, 2021, Dr. Amusa had noted (without identifying any specific page of

1 Plaintiff's medical records) that Plaintiff's neurologist "appears to opine" that her headaches as
2 well as her "cognitive seizures" are "well-controlled on medication." *See id.* at 71. Dr. Amusa
3 noted (at the June hearing) that Plaintiff's migraines (1) did not meet the 12-month durational
4 requirement; and (2) that their frequency was not such as to medically equal listing level severity.
5 *Id.* at 73-74. There is no indication, at either hearing, that the ALJ inquired any further into the
6 frequency, or attendant limitations, caused by Plaintiff's migraines by either asking Plaintiff any
7 questions about the migraines, or by otherwise seeking to develop the record in that regard. *See*
8 *generally id.* at 54-138.

9 The record also contains numerous indications that Plaintiff suffers from fibromyalgia. *See*
10 *id.* at 639, 641, 645, 651-52, 656, 658, 660, 664, 671-72, 681, 690-91, 696, 705-06, 710, 713, 726,
11 735-36 (Plaintiff's treating neurologist, Jill Ann Goslinga, M.D., describing Plaintiff's
12 "longstanding fibromyalgia"), 739, 741 (Dr. Goslinga noting that Plaintiff's "fibromyalgia pain is
13 along her paraspinals bilaterally," as well as "another pain that feels like it's in her spine itself."),
14 1087, and 1109. At both hearings, the ALJ asked Dr. Amusa to render an opinion about Plaintiff's
15 fibromyalgia diagnosis, to which Dr. Amusa replied by stating that she did not see fibromyalgia
16 "well-supported in the evidence," due to "a lack of documentation of the usual tender points or
17 [an] evaluation by a rheumatologist for that condition." *Id.* at 72, 114.

18 The record also manifests issues with Plaintiff's cognitive function and memory loss. *See*
19 *id.* at 651, 654, 656, 665, 668, 680, 683-84, 729, 731, 733, 735-36, 741-42, 744, and 1088. At the
20 hearing on June 1, 2021, Plaintiff answered the ALJ's question about what items she might be able
21 to cook by explaining that her memory problems create problems in the kitchen, causing her to
22 burn herself frequently. *Id.* at 68. Then, while engaging Plaintiff regarding the physical elements
23 associated with the exertion level of various types of work, Plaintiff reiterated that her memory
24 deficits would be an issue with many types of work. *Id.* at 87. At the September 10, 2021, hearing,
25 while the ALJ was addressing Plaintiff with a discussion about a hypothetical person in her
26 position being able to perform as a fast-food worker or store clerk (*i.e.*, positions in which Plaintiff
27 had been previously employed), Plaintiff stated, "I don't think I heard anything about memory
28 problems in either [hypothetical], which is really the big one for me because I have a lot of short-

1 term memory issues.” *Id.* at 135. When the ALJ asked Plaintiff to describe how her memory
2 deficits might affect her in the workplace, she stated that “[a] lot of times I’ll forget what I’m
3 doing while I’m doing [it], which tends to be an issue.” *Id.* at 136. Lastly, as to physical
4 limitations, in May 2021, Paul Lynn, M.D. completed a Thyroid Disorder Medical Assessment
5 Form and opined that the Plaintiff could sit, stand, and walk less than 2 hours in an 8-hour day;
6 occasionally lift less than 10 pounds; and that Plaintiff would be absent from work more than four
7 days a month. *See id.* at 1099-1102.

8 THE ALJ DECISION

9 The ALJ in this case engaged in the required five step sequential evaluation process. *See id.* at 29-30.
10 At step one, the ALJ determined Plaintiff had not performed substantial gainful
11 activity between her alleged onset date of June 30, 2017, and March 31, 2019, her date last
12 insured. AR at 30. At step two, the ALJ determined Plaintiff’s only severe impairment was
13 dyscognitive seizure disorder. *Id.* at 31. Mentioning an office visit in January of 2019, the ALJ
14 found that Plaintiff’s migraines were reported as being under control on that day, and thus, the
15 ALJ found the migraines to be non-severe. *Id.* As for Plaintiff’s fibromyalgia, the ALJ found it to
16 be non-severe because of Dr. Amusa’s testimony to the effect that the record did not evidence
17 clear support for this diagnosis due to a lack of discussion of trigger points and because Plaintiff
18 “has not been evaluated by a rheumatologist.” *Id.* The ALJ made no mention of Plaintiff’s
19 memory problems at Step Two. *See id.* at 31-32. At Step Three the ALJ found that none of
20 Plaintiff’s conditions met or equaled any listed impairment. *Id.* at 32. In formulating Plaintiff’s
21 residual functioning capacity (“RFC”), the ALJ determined that Plaintiff could perform light
22 work, with a number of physical limitations. *Id.* at 32-35. Given that the ALJ’s formulation of
23 Plaintiff’s RFC was wholly inconsistent with Dr. Lynn’s physical limitation opinions, the ALJ
24 justified rejecting Dr. Lynn’s opinions by stating that “Dr. Lynn does not state when the
25 limitations first applied . . . [as] he first treated the claimant on January 20, 2021, which is nine
26 months after the after the date last insured.” *Id.* at 35. At Step Four, the ALJ concluded that
27 Plaintiff was capable of performing her past relevant work as a barista, fast-food worker, and
28 salesclerk – and, a finding of non-disability was entered. *Id.* at 35-36.

DISCUSSION

The ALJ erred in this case by failing to develop the record regarding the evaluation of Plaintiff's migraines, her memory deficits and other cognitive problems associated with her seizure disorder, her fibromyalgia, and the basis and temporal applicability for Dr. Lynn's opinions as to her physical limitations. Because the ALJ did not develop the record properly, the ALJ's determinations at Step Two and beyond are not supported by substantial evidence and remand for further record development is necessary.

"The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings . . . [which] are inquisitorial rather than adversarial[,] [thus] [i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." *Sims v. Apfel*, 530 U.S. 103, 110-111 (2000). It is therefore well established that "[i]n Social Security cases the ALJ has a special duty to fully and fairly develop the record and to assure that the claimant's interests are considered." *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). "Given that a large portion of Social Security claimants either have no representation at all or are represented by non-attorneys (see *Sims*, 530 U.S. at 112), courts have recognized that "[w]hen the claimant is unrepresented . . . the ALJ must be especially diligent in exploring for all the relevant facts." See *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). Indeed, "[t]he ALJ's duty to develop the record fully is also heightened where the claimant may be mentally ill and thus unable to protect her own interests." *Id.*

Initially the court will note that, in light of the voluminous evidence, *supra*, regarding Plaintiff's migraines (a condition from which she suffered for a number of years and which the record reflects was not abated by treatment), it was error for the ALJ to rely on a single notation from 2019 to conclude that the condition was "under control," and therefore non-severe. The severity evaluation at step two is a *de minimis* test intended to weed out the most minor of impairments. See *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987); *Edlund v. Massanari*, 253 F.3d 1152, 1158 (9th Cir. 2005) (stating that the step two inquiry is a *de minimis* screening device to dispose of groundless claims) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)); *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An impairment is non-severe at step two

1 only if the evidence establishes a slight abnormality that has only a minimal effect on an
2 individual's ability to work. *Smolen*, 80 F.3d at 1290. Due to the ALJ's Step Two error, it is
3 evident that Plaintiff's migraines were not properly accounted for at step three, during the
4 formation of the RFC, or beyond.

5 Regarding the state of the record, the court finds that the record is insufficiently developed
6 as to the limitations occasioned by Plaintiff's migraines, the particulars of her fibromyalgia
7 diagnosis, the details underlying her memory deficits and other cognitive issues related to her
8 dyscognitive seizure disorder, and the physical limitations opined by Paul Lynn. As to Plaintiff's
9 memory deficits and potential cognitive limitations associated with her dyscognitive seizure
10 disorder, on remand, the ALJ is **ORDERED** to procure a consultative psychological examination
11 that would include the administration of the following diagnostic instruments: the Wechsler Adult
12 Intelligence Scale-IV ("WAIS-IV"), the Wechsler Memory Scale ("WMS-IV"), and the Trail
13 Making Test ("TMT") Parts A and B.⁴ As to Plaintiff's fibromyalgia, the ALJ and the testifying
14 medical expert concluded that the record was undeveloped because – despite ample evidence of a
15 sustained fibromyalgia diagnosis – the record lacked specific documentation about trigger points;
16 also, the ALJ specifically found that the evidence does not support a fibromyalgia diagnosis
17 because Plaintiff "has not been evaluated by a rheumatologist." See AR at 31. Accordingly, on
18 remand, the ALJ is **ORDERED** to procure a consultative examination by a rheumatologist such as
19 to properly develop the record in this regard. Lastly, the ALJ rejected Plaintiff's physical
20 limitations, as opined in May of 2021 by Dr. Paul Lynn, because (1) the ALJ was unsure whether
21 or not those limitations also applied during the disability period (*i.e.*, between June of 2017 and
22 March of 2019); and (2) the ALJ was unsure about the basis on which Dr. Lynn had opined those
23 limitations. See AR at 35. On remand, the ALJ is **ORDERED** to either subpoena Dr. Lynn to
24 appear at a hearing, or to otherwise communicate or correspond with Dr. Lynn, in order to develop
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⁴ One way the ALJ may fulfill the obligation to develop the record is to order a consultative examination —
27 that is, "a physical or mental examination or test purchased for [the claimant] at [the Administration's] request
28 and expense." 20 C.F.R. §§ 404.1519, 416.919; *see also Reed v. Massanari*, 270 F.3d 838, 841 (9th Cir.
2001) ("One of the means available to an ALJ to supplement an inadequate medical record is to order a
consultative examination.").

1 a clear record with regard to the medical basis for Dr. Lynn's opinions and their applicability to
2 the disability period in question because "[a]mbiguous evidence, or the ALJ's own finding that the
3 record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to
4 conduct an appropriate inquiry . . . [and] [t]he ALJ may discharge this duty in several ways,
5 including: subpoenaing the claimant's physicians, submitting questions to the claimant's
6 physicians, continuing the hearing, or keeping the record open after the hearing to allow
7 supplementation of the record." *Tonapetyan*, 242 F.3d at 1150.

8 As to Plaintiff's other claims (*see* Pl.'s Opp. (dkt. 18) at 1-4), on remand, the
9 Commissioner is **ORDERED** to consider the other issues raised in Plaintiff's briefing and to
10 modify any ensuing ALJ opinion such as to reflect the fact that all the issues raised in this case by
11 Plaintiff have been considered and addressed. *See Cortes v. Colvin*, No. 2:15-cv-02277-GJS, 2016
12 U.S. Dist. LEXIS 40580, 2016 WL 1192638, at *4 (C.D. Cal. Mar. 28, 2016); *Cochran v.*
13 *Berryhill*, No. 3:17-cv-00334-SB, 2017 U.S. Dist. LEXIS 212380, at *21 (D. Or. Dec. 28, 2017);
14 *Steven M. v. Saul*, No. 19-cv-06991-RMI, 2021 U.S. Dist. LEXIS 52225, at *16-17 (N.D. Cal.
15 Mar. 19, 2021).

16 CONCLUSION

17 For the reasons stated above – following the court's independent review of the record in
18 Plaintiff's action for review under 42 U.S.C. § 405(g) – the court finds that the ALJ's non-
19 disability decision in this case was not support by substantial evidence. Accordingly, Plaintiff's
20 Motion for Summary Judgment (dkt. 15) is **GRANTED**, Defendant's Cross-Motion (dkt. 17) is
21 **DENIED**. The case is remanded for further proceedings consistent with the findings and
22 conclusions set forth herein.

23 IT IS SO ORDERED.

24 Dated: March 11, 2024

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ROBERT M. ILLMAN
United States Magistrate Judge